U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF TV-I- INC.

DATE: OCT. 27, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology services, seeks to permanently employ the Beneficiary as a senior SAP manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

After initially approving the petition on December 19, 2006, the Director, Nebraska Service Center, revoked the petition's approval on March 19, 2015. The Director invalidated the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), concluding that the Petitioner willfully concealed the Beneficiary's status as one of its corporate officers. Finding that the Beneficiary was in a position to influence hiring decisions, the Director also concluded that the job opportunity was not clearly open to U.S. workers.

On appeal, we withdrew the Director's conclusion that the Petitioner willfully concealed the Beneficiary's status and reinstated the validity of the accompanying labor certification. But we found that the record did not establish the *bona fides* of the job opportunity or the Beneficiary's possession of the qualifying educational credentials for the offered position. We therefore dismissed the appeal.

The matter is now before us on motions to reopen and reconsider. The Petitioner asserts that we lacked authority to determine the *bona fides* of the job opportunity and submits additional evidence of the Beneficiary's educational qualifications. After careful consideration, we will deny the motion to reopen and the motion to reconsider.

## I. LAW AND ANALYSIS

### A. Our Authority to Determine the *Bona Fides* of the Job Opportunity

A petition for an advanced degree professional must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i).

We may deny a petition accompanied by a labor certification that does not comply with DOL regulations. *See, e.g., Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (affirming a petition's denial where the accompanying labor certification was invalid for the intended, geographic area of employment).

On the accompanying labor certification, the Petitioner attested that "[t]he job opportunity has been and is clearly open to any U.S. worker." *See* 20 C.F.R. § 656.10(c)(8) (requiring labor certification employers to certify the *bona fides* of a job opportunity). The attestation "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

> Where the alien for whom alien labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.

*Id.*

To determine the *bona fides* of a job opportunity, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in its management; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated on an accompanying labor certification. *Id.* *8. We must also consider whether a foreign national's pervasive presence and personal attributes would likely cause a petitioner to cease operations in the foreign national's absence, and whether the employer complied with DOL regulations and otherwise acted in good faith. *Id.*

In our appellate decision, we concluded that the record did not establish the clear availability of the offered position to U.S. workers and therefore the validity of the accompanying labor certification. At the time of the application's filing, we found evidence that the Beneficiary was a corporate officer of the Petitioner and one of a small group of its employees. We also found that he recruited employees for the company and was the only employee to live near its U.S. office. Together, these

*Modular Container* factors suggest that the Beneficiary was in a position to control or influence hiring decisions regarding the offered position.[1]

On motion, the Petitioner asserts that, by approving the accompanying labor certification, the DOL "already determined that the job offer is a *bona fide* job opportunity." Under 20 C.F.R. § 656.30(d), U.S. Citizenship and Immigration Services (USCIS) may invalidate a labor certification after its issuance only upon a finding of fraud or willful misrepresentation of a material fact involving the certification. Because we found no misrepresentation on the labor certification, the Petitioner asserts that the certification remains valid and reflects DOL's determination of a *bona fide* job opportunity.

Contrary to the Petitioner's assertion, however, the record does not indicate the DOL's certification of the accompanying labor certification after consideration of the *bona fides* of the job opportunity. The DOL generally adjudicates a labor certification application based solely on the attestations of an employer and a beneficiary on the ETA Form 9089. *See Matter of HealthAmerica*, 2006-PER-00001, 2006 WL 5040202, *10 (BALCA 2006) (*en banc*) (explaining that the DOL designed the current labor certification system to emphasize administrative efficiency and streamlining). To consider the *bona fides* of a job opportunity, the DOL must "audit" an application and request supporting documentation from an employer. *See* 20 C.F.R. § 656.17(l) (stating that an employer must demonstrate the existence of a *bona fide* job opportunity "in the event of an audit").

The instant record does not indicate the DOL's audit of the Petitioner's labor certification application or the agency's consideration of the *bona fides* of the instant job opportunity. The record therefore indicates that the DOL was unaware of evidence of the Beneficiary's influence on hiring for the offered position.

The Petitioner correctly states that USCIS may only invalidate a labor certification after its issuance based on a finding of fraud or willful misrepresentation of a material fact involving the labor certificate. *See* 20 C.F.R. § 656.30(d). But, in the instant case, we did not invalidate the accompanying labor certification. Pursuant to case law, we denied the petition because the labor certification did not comply with DOL regulations.

In *Sunoco Energy*, a labor certification accompanying a petition stated a job opportunity for a mining engineer at a project in Vernal, Utah. *Sunoco Energy*, 17 I&N Dec. at 283. The petitioner intended to employ the beneficiary at another project in a different state. *Id.* Citing 20 C.F.R. § 656.30(c)(2), a DOL regulation limiting a labor certification's validity to its stated geographic area of intended

[1] On appeal, counsel seeks to explain evidence cited in our appellate decision of the Beneficiary's recruiting activities, asserting that copies of the Beneficiary's email messages discuss only the qualifications of candidates for H-1B nonimmigrant visa employment, not for employment in the offered position. But counsel's unsupported assertions do not constitute probative evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

employment, the Regional Commissioner affirmed the petition's denial for lack of a valid labor certification. *Id.* at 283-84.

*Sunoco Energy* did not involve invalidation of an accompanying labor certification based on fraud or willful misrepresentation under 20 C.F.R. § 656.30(d). Rather, the case affirmed the immigration service's denial of the petition based on a violation of DOL labor certification regulations. *See Sunoco Energy*, 17 I&N Dec. at 284 (stating that "[t]he regulations are clear. The validity of a labor certification is limited to the particular job described in the job offer portion of the labor certification").

The Petitioner asserts that *Sunoco Energy* "merely stands for the proposition that the [l]abor certification is only valid for a job offer in the area stated in the application of labor certification." But the petition's denial in *Sunoco Energy* stemmed from a violation of DOL labor certification regulations. The case therefore supports our authority to deny a petition accompanied by a labor certification that violates DOL regulations. Similar to the invalid labor certification in *Sunoco Energy* that violated DOL regulations regarding the area of intended employment, the labor certification accompanying the instant petition violates DOL regulations requiring a *bona fide* job opportunity. As in *Sunoco Energy*, the instant petition is therefore not accompanied by a valid labor certification.

When adjudicating immigrant visa petitions, the Act requires USCIS to undertake "an investigation of the facts in each case." Section 204(b) of the Act, 8 U.S.C. § 1154(b). The Act also reflects Congress' intention to allow immigrant workers only when "there are not sufficient [U.S.] workers who are able, willing, qualified . . . and available." Section 212(a)(5)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i)(I).

The Petitioner's assertion that USCIS cannot determine the *bona fides* of a job opportunity thwarts Congress's statutory command and intention. Under the Petitioner's assertion, USCIS could not deny a petition upon discovering derogatory information unknown to the DOL that a position was not clearly open to U.S. workers.

For the foregoing reasons, we reject the Petitioner's assertion that we lacked authorization to determine the *bona fides* of the job opportunity.

B. The Beneficiary's Educational Qualifications

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position.

We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the petition's priority date is April 15, 2006, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states the minimum requirements of the offered position of senior SAP manager as a U.S. master's degree or a foreign equivalent degree in engineering, operations, or information systems, plus 24 months of experience in the job offered.

On the labor certification, the Beneficiary attested to his receipt of a master's degree in operations research from the India, in 1970. A copy of a master of arts degree in operational research from the university that year states the Beneficiary's qualifications for the degree.

In our appellate decision, we found that the record did not establish the Beneficiary's possession of a master's degree as specified on the accompanying labor certification. The Petitioner submitted an evaluation of the Beneficiary's foreign educational credentials indicating that his Indian master of arts degree equates to only 2 years of university-level studies in the United States.

On motion, the Petitioner submits two additional evaluations of the Beneficiary's foreign educational credentials. The evaluations conclude that the Beneficiary has the equivalent of a U.S. master of science degree in operations management based on a combination of education and experience. The evaluations specifically find that the Beneficiary has the equivalent of a U.S. bachelor's degree followed by 5 years of experience.

The additional evaluations support the Beneficiary's qualifications for the requested classification of advanced degree professional. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" to include a bachelor's degree followed by 5 years of progressive experience in a specialty). But the evaluations do not establish the Beneficiary's qualifications for the offered position specified on the accompanying labor certification.

The accompanying labor certification states that the offered position requires a master's degree without a combination of education and experience. Part H.4. of the ETA Form 9089 states the minimum level of education for the offered position as "[m]aster's." Part H.8 of the form states that "[n]o" alternate combination of education and experience is acceptable. The labor certification does not otherwise indicate the acceptability of education less than a U.S. master's degree or a foreign equivalent degree.

The Petitioner's additional evidence on motion does not establish the Beneficiary's possession of the minimum educational requirements for the offered position as specified on the accompanying labor certification. We will therefore deny the motion to reopen.

## II. CONCLUSION

Case law, the Act, and Congressional intent support our authority to determine the *bona fides* of the instant job opportunity and to deny the petition for lack of a valid labor certification. We will therefore deny the Petitioner's motion to reconsider. The Petitioner's evidence on motion does not establish the Beneficiary's educational qualifications for the offered position. We will therefore also deny the motion to reopen.

The petition will remain denied for the above-state reasons, with each considered an independent and alternate basis of denial. As in visa petition proceedings, a petitioner in visa revocation proceedings bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Here, the instant Petitioner did not meet that burden.

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of TV-I- Inc.*, ID# 10518 (AAO Oct. 27, 2016)